TABLE OF CONTENTS

PAGE

Order of Final Judgment of New Jersey Superior Court in *Instructional Systems, Inc. v. Computer Curriculum Corp.* RA1

Letter-Opinion and Order of United States District Court in *Instructional Systems, Inc. v. Computer Curriculum Corp.* RA5

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
PASSAIC COUNTY

Docket Nos. C-1133-89E, C-4116-89E

Hon. Arthur C. Dwyer, J.S.C.

CIVIL ACTION

Filed November 2, 1989

INSTRUCTIONAL SYSTEMS, INC.,
a Corporation of the State of New Jersey,

Plaintiff,

—vs.—

COMPUTER CURRICULUM CORPORATION,
a Corporation of the State of Delaware,

Defendant.

ORDER OF FINAL JUDGMENT

THIS MATTER having been opened to the Court on the application of Dunn, Pashman, Sponzilli, Swick & Finnerty, attorneys for Instructional Systems, Inc. ("ISI"), for a declaratory judgment and ancillary relief, with respect to certain of its rights under the New Jersey Franchise Practices Act, *N.J.S.A.* 56:10-1 *et seq.* ("Act") and McCarter & English, counsel for Computer Curriculum Corporation, having filed a cross-motion seeking an Order dismissing the Complaint filed in Docket No. C-4116-89E and each of the parties hav-

ing been afforded the opportunity to take the additional discovery requested by them and this Court having heard the arguments of counsel on behalf of both parties on October 12, 1989 relative to their cross-applications and this Court having made on the record findings of fact and conclusions of law on October 30, 1989, which record is incorporated by reference into this Order, and good cause having been shown;

IT IS on this _____ day of November 1989

ORDERED AND ADJUDGED that the proceedings in Docket No. C-1133-89E and Docket No. C-4116-89E be and are hereby consolidated by the Court on its own motion;

IT IS FURTHER ORDERED AND ADJUDGED that this Court has jurisdiction to enter a Final Judgment in this matter under the Declaratory Judgment Act, *N.J.S.A.* 2A:16-15 *et seq.*;

IT IS FURTHER ORDERED AND ADJUDGED that a Final Judgment be and hereby is entered declaring that:

a) as a matter of law, the Act applies to the Agreements dated October 9, 1980 and July 12, 1984 between CCC and ISI ("Agreements");

b) CCC in the Agreements grants to ISI a "license" as that term is used in the Act;

c) the Agreements and the acts of the parties thereunder create a "community of interest" as the term is used in the Act;

d) ISI has maintained a "place of business" as that term is used in the Act;

e) ISI and CCC "contemplated" at the time the Agreements were executed that ISI would in the performance of the Agreements maintain a "place of business" within the State of New Jersey as those terms are used in *N.J.S.A.* 56:10-4(1);

f) the Agreements constitute "franchises" as that term is used in the Act; and

g) the Court has stated that the Legislature did not intend the law of New Jersey to have extraterritorial effect. ISI and CCC in the contract, which is the franchise, defined a market area which includes states beyond the State of New Jersey. The Legislature intended the Act to apply to New Jersey franchises and the rights thereunder whether or not the market area is beyond New Jersey. To the extent that the laws of other states apply by reason of activities of the parties and the terms of those laws, then they would apply. See *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985);

IT IS FURTHER ORDERED AND ADJUDGED that CCC's cross-motion for summary judgment is denied in its entirety;

IT IS FURTHER ORDERED AND ADJUDGED that ISI's application to have this Court consider issues encompassed by the First Count of the Complaint in Docket No. C-4116-89E (including whether the Act was violated by the non-renewal of July 12, 1984 Agreement, the appropriate remedy(s) and the award of attorneys' fees and costs), above and beyond those construed by this Court as remitted in the Orders dated July 20 and July 27, 1989 of the Honorable Alfred J. Lechner, Jr., United States District Judge for the District of New Jersey, is denied, based on the construction of the Orders by this Court that jurisdiction over the other issues and relief encompassed in the First Count of the Complaint in Docket No. C-4116-89E have been retained by the United States District Court for the District of New Jersey in the pending federal action (now stayed and administratively terminated);

IT IS FURTHER ORDERED AND ADJUDGED that the Superior Court, Passaic County, Chancery Division, having determined all matters remitted to it by Judge Lechner's Order dated July 27, 1989, the Court enters a Final Judgment declaring the rights as found; and

IT IS FURTHER ORDERED AND ADJUDGED that a copy of this Order be served upon all counsel within 5 days of the date of this Order.

/s/ ARTHUR C. DWYER
Hon. Arthur C. Dwyer, J.S.C.

RA5

NOT FOR PUBLICATION

LETTER-OPINION AND ORDER
ORIGINAL FILED WITH THE CLERK OF THE COURT

20 July 1989

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Re: *Instructional Systems, Inc. v. Computer Curriculum Corporation*
Civil Action No. 89-502

Counsel:

The complaint in this matter was initially filed by Instructional Systems, Inc. ("ISI") in the Superior Court of New Jer-

sey, Chancery Division, Passaic County on January 30, 1989. On February 6, 1989 defendant Computer Curriculum Corporation ("CCC") removed this matter from the Superior Court of New Jersey to the United States District Court for the District of New Jersey. On March 27, 1989 CCC filed its Answer and a Counterclaim.

The Complaint alleges that CCC, by terminating ISI's status as an exclusive distributor of CCC products and services in various states other than New Jersey violated the New Jersey Franchise Practices Act, N.J.S.A. 56:10-1 *et. seq.* (the "Franchise Practices Act"). Complaint, Count One. ISI also sets forth six additional counts alleging breach of agreement, breach of implied covenant of good faith and fair dealing, tortious interference with respect to economic advantage, unfair competition, unjust enrichment and breach of fiduciary relationship. Complaint, Counts Two through Seven. The Answer of CCC generally denies the allegations of the Complaint and sets forth affirmative defenses. CCC also filed a counterclaim which alleges ISI breached the agreement at issue.

Presently pending is the ISI application for preliminary injunctive relief and motion for partial summary judgment with regard to the Franchise Practices Act. CCC has opposed the application for preliminary injunctive relief and motion for partial summary judgment, and has cross-moved for partial summary judgment with regard to the Franchise Practices Act. Neither the Answer nor the Counterclaim of CCC raised a federal question. However, in its Memorandum of Points and Authorities in Opposition to the Application for Preliminary Injunction and Motion for Partial Summary Judgment, CCC charged that "applying the New Jersey Act [Franchise Practices Act] to this [c]ase would be an [u]nconstitututional [r]estraint on [i]nterstate [c]ommerce." CCC's Memorandum at 12. As support for this proposition, CCC cited *Healy v. The Beer Institute, Inc.*, ___ U.S. ___, 57 U.S.L.W. 4748 (June 19, 1989).

Following receipt of ISI's opposition brief to the CCC motion for partial summary judgment and reply brief in sup-

port of its application for preliminary injunction and motion for partial summary judgment. ISI sought and was granted leave to file a supplemental memorandum of law regarding abstention. This filing was effected on July 12, 1989. CCC was given leave to file opposition by July 14, 1989. For the reasons which follow, the application of ISI to have this court abstain and remit several of the issues in this case to the courts of New Jersey, to afford the state courts a fair opportunity to decide those issues, on the grounds of abstention pursuant to *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), is granted.

In addition to alleging that the application of the Franchise Practices Act would be an unconstitutional restraint on interstate commerce as applied to this case, CCC has alleged the following:

> 1. The relationship between CCC and ISI is not a franchise and is not subject to the Franchise Practices Act because (a) ISI has never been required to maintain a place of business in New Jersey, its New Jersey headquarters is not a "place of business" and it was not required to maintain its offices in New Jersey, (b) ISI has no community of interest with CCC in that is has not made substantial CCC-specific investments and (c) ISI is a mere licensee.
>
> 2. CCC has not violated the Franchise Practices Act.

See CCC Memorandum in Opposition to Plaintiff's Application for Preliminary Injunction and Partial Summary Judgment and in Support of its Motion for Partial Summary Judgment at 15-42.

As CCC notes in its Supplemental Memorandum of Law on Abstention:

> [F]ederal courts should abstain only when there is a significantly greater chance that it will err in its interpretation of a state statute than would a state court. Moreover, the Third Circuit has held that difficulty of

> determining state law is not, by itself, a sufficient ground for abstention.

Id. at 8 (citations omitted). In this case, it is not the difficulty of determining state law itself which justifies abstention. Specifically, it is the absence of case law guidance and legislative history which necessitates remitting of the nonconstitutional issues to the New Jersey courts for a fair opportunity to determine them. This point of view was forcefully made in a recent Third Circuit decision.

In *New Jersey American, Inc. v. The Allied Corporation*, 875 F.2d 58 (3d Cir. 1989), Judge Becker had an opportunity to discuss the Franchise Practices Act. In connection with this decision ISI, in its Supplemental Memorandum, states: "Judge Becker's opinion in *New Jersey American* can be seen as a plea for the New Jersey courts to offer more guidance on issues surrounding the interpretation of the Franchise Act." Plaintiff's Supplemental Memorandum of Law Regarding Abstention at 10. Although no specific quotation or page reference to the opinion is offered by ISI, it is assumed the quoted statement from the Supplemental Memorandum refers to at least the following three comments of Judge Becker in the *New Jersey American* opinion:

> No New Jersey case gives us significant guidance and the legislative history is of little help.

875 F.2d at 59.

> Determining the reach of the New Jersey [Franchise Practices] Act is no easy task. The Act's vague "community of interest" language and sparse legislative history make it difficult to determine the scope of the Act.

Id. at 63.

> That approach [referring to how the Circuit dealt with the problem in *New Jersey American*], to some extent, fudges the issue, but in the absence of guidance from the New Jersey courts, we are unable to devise an approach

> that better effectuates what we believe to be the purposes underlying the New Jersey [Franchise Practices] Act.

Id. at 65.

ISI contends that most of the reported cases interpreting the definitional requirements of the Franchise Practices Act are federal decisions and that remitting these issues would give the New Jersey courts a fair opportunity to "flesh out the definitional requirements of 'place of business,' 'community of interest' and 'license.' " Plaintiff's Supplemental Memorandum at 9.

In addition to the issues concerning various aspects of the Franchise Practices Act, ISI contends that remitting them to the state judiciary may well avoid a constitutional issue in this case. It appears the constitutional issue in this matter does not go to the validity of the Franchise Practices Act *per se* but rather concerns the application of the Franchise Practices Act to the facts of this case.

CCC raises a number of arguments in opposition to ISI's position on abstention. CCC suggests it is improper for a plaintiff both to request abstention and seek injunctive relief which calls for a broad interpretation of the state statute in question. CCC declares: "This may be the only case in history in which a party has attempted to defeat federal jurisdiction by admitting that its own interpretation of a state statute raises serious constitutional questions." CCC Supplemental Memorandum at 1. While CCC may be correct that the party requesting abstention generally advocates the more narrow interpretation of the state law. ISI's position on the Franchise Practices Act in no way compromises the propriety of this court's decision to abstain. A federal court's responsibility to abstain when confronted with unsettled questions of state law which potentially raise constitutional issues is not dependent upon the breadth of the statutory construction suggested by either party. Rather "[t]he justification for this power, to be exercised within the indicated limits, lies in regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations

in a matter close to the political interests of a State." *Louisiana P. & L. Co. v. Thibodaux*, 360 U.S. 25, 29 (1959).

CCC argues that ISI does not have a franchise, as defined by the Franchise Practices Act, and, as well, the activities of ISI in states other than New Jersey are not protected by the Franchise Practices Act in connection with its agreement with CCC. If the New Jersey courts determine ISI does not fit within the definitional requirements of a franchise or that the Franchise Practices Act is inapplicable to States other than New Jersey, the need to address the commerce clause question in this matter will be eliminated.

In *Pullman*, the Court stated that:

> But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas.

312 U.S. at 499-500. Substitution of references to the Franchise Practices Act and the State of New Jersey in lieu of the references to the State of Texas and Article 6445 in the above-quoted portion of *Pullman* succinctly demonstrates the reason for abstention in this case. As noted by Judge Becker and ISI, there are no New Jersey cases to offer significant guidance in this area. Questions concerning the application of the Franchise Practices Act to the circumstances of this case both with regard to definitional requirements and jurisdictional application will do much to resolve the issues and possibly moot the entire matter.

CCC suggests this court should dispose of the numerous threshold issues regarding the applicability of the Franchise Practices Act before abstaining and remitting them to state court for a ruling on the extraterritorial reach of the Act. Citing to *Burton v. United States*, 196 U.S. 283, 295 (1905), CCC states that before a court may reach a constitutional

question, it must attempt to dispose of the case on non-constitutional grounds. According to CCC, because there are numerous non-constitutional reasons why ICI should lose this case, the court must address these issues before reaching CCC's constitutional argument. However, as CCC so forcefully argued in its initial submission, ICI invokes the Franchise Practices Act in a manner which may be unconstitutional. That is, if the New Jersey Legislature intended the Franchise practices Act to apply extraterritorially, this application may be unconstitutional, thereby rendering detailed analysis of ICI's franchise activities irrelevant. Similarly, if the New Jersey courts find the Franchise Practices Act was not intended to apply extraterritorially, as the court concluded in *Carlos v. Philips Business Systems, Inc.*, 576 F.Supp. 769 (E.D.N.Y), *aff'd*, 742 F.2d 1432 (2d Cir. 1983), ICI has no cause of action against CCC under the Franchise Practices Act.

In *Consumers Oil Corp. v. Phillips Petroleum Co.*, 488 F.2d 816 (3d Cir. 1973), the Circuit on its own motion directed the district court to stay the proceedings and found an "appropriate exercise of the policy of federal abstention pending . . . expeditious resort to a state court for a determination whether the [Franchise Practices] Act, . . . , applies to this case." *Id.* at 820.

In *Consumer Oil Corp.*, the Circuit noted that:

> In our view, these circumstances call for consideration of whether, in a case where jurisdiction is based soley upon diversity of citizenship, a federal court should abstain from attempting to anticipate the answer New Jersey courts would give to doubtful questions of interpretation of the New Jersey statute. Our concern is heightened by awareness that an interpretation of the Franchise Practices Act as prohibiting Phillips from discontinuing its operations throughout the state would precipitate substantial constitutional questions.

* * *

> Since these constitutional questions are substantial and the New Jersey courts might interpret the statute in a way that would avoid them, we think it appropriate that federal courts abstain from deciding the merits of the present controversy at this time.

Id. at 819 (footnotes omitted). The Circuit also noted that because there was uncertainty with regard to another issue which might render constitutional issues moot, there the meaning of the term "renewal," that issue should be presented to the New Jersey courts as well. *Id.* at 819-820 n. 3.

In this case, the facts are on a parallel and in one respect even stronger. In the present case, the Franchise Practices Act is at issue and a constitutional challenge in addition to challenges based upon non-constitutional issues (e.g., existence of a franchise, "place of business," "community of interest," "license") are present as in *Consumer Oil.* However, this matter was removed from state court; *Consumer Oil* was filed in federal court. In addition, ISI seeks to remit these issues to the state court while acknowledging the possibility of delay in decision.

In *Frederick L. v. Thomas*, 578 F.2d 513 (3d Cir. 1978) the issue of abstention was presented. The court in *Thomas* noted that the " 'classic' case for application of the *Pullman* doctrine involves a constitutional attack on a state statute under circumstances where one possible construction of the statute would avoid or substantially alter the constitutional issue." 578 F.2d at 516. It went on to note that:

> [T]he trial court was faced with a situation in which abstention would serve the dual purpose of permitting the Courts of Pennsylvania to decide an unclear question of state law in an area of particular state concern and of avoiding a decision on several federal constitutional questions unless and until it became clear that they must be decided. These are among the interests which the abstention doctrine was designed to serve.

Id. at 517-18. Likewise, in this case, a classic scenario is presented for the application of the *Pullman* doctrine through the presentation of unclear questions of state law in an area which appears to be of particular state concern. This point is forcefully made by the very wording of the Franchise Practices Act:

> The Legislature finds and declares that distribution and sales through franchise arrangements in the State of New Jersey vitally affects the general economy of the State, the public interest and the public welfare. It is therefore necessary in the public interest to define the relationship and responsibilities of franchisors and franchisees in connection with franchise arrangements.

N.J.S.A. 56:10-2.

Although the majority in *Thomas* found the application for abstention was timely, the dissent by Judge Gibbons strongly indicated that indeed it was not timely. In addition, he stated that: "In no case that I know of has *Pullman* abstention produced any but doleful consequences to the litigant who resorted to a federal forum." 578 F.2d at 518 (Gibbons, J., dissenting). Judge Gibbons noted that in *Thomas* the plaintiff would be forced to encounter difficulties similar to those which he had listed. A significant difference here, however, is that "the party bringing the lawsuit, ISI, is requesting an application of the *Pullman* doctrine and thus can not [sic] be heard to complain about any delays[1] caused by an abstention."[2] Plaintiff's Supplemental Memorandum at 4.

---

[1] Because of ISI's application to remit, the application for a preliminary injunction presently pending before this court is deemed withdrawn; this was confirmed at oral argument. I specifically note the issue of the application for a preliminary injunction is *not* remitted to the state courts for consideration because consideration of such an application would necessarily involve the constitutional issue which remains in this court.

[2] In its Supplemental Memorandum of Law on Abstention, CCC states it will be injured by abstention in this case. Other than merely asserting the contention of injury resulting from absention, CCC offers no basis to conclude injury will result. CCC Supplemental Memorandum at 10.

The threshold issue in this case is necessarily whether ICI has properly invoked the Franchise Practices Act. Before a court may legitimately consider whether ICI is a franchise within the meaning of the act and was terminated for good cause, it must ascertain whether the act applies as suggested by ICI. If the Franchise Practices Act does not apply extraterritorially, the court's inquiry on this issue is at an end, because a court should not work through the mechanics of a statute not properly placed before it. Without a determination concerning the intended reach of the Franchise Practices Act, this court must proceed down a long road of statutory analysis and fact finding, a road which may ultimately prove to have been travelled in vain.

Only by abstaining at this time and affording the courts of New Jersey a fair opportunity to provide a definitive interpretation of the Franchise Practices Act will judicial resources be expended wisely. As the Supreme Court observed in *Pullman*: "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." 312 U.S. at 500.

By abstaining from reaching the merits of ICI's claim at this time, the judicial duty of this court is not abrogated. While abstention in a diversity case may be resorted to only in exceptional circumstances, the classic case for abstention arises where the challenged state statute is susceptible of a construction by the state courts which would avoid or modify the federal constitutional question. *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972). By handling this case in this matter, not only are the state courts given the opportunity to confront and resolve unsettled questions of state law which are likely to arise again in the future, but this court avoids decision on a constitutional question until clearly necessary. *Frederick L.*, 578 F.2d at 517.

Finally, it is noted CCC is not deprived of its rights to a federal forum. While abstention in a diversity case which has been removed to federal court by the defendant necessarily postpones the defendant's substantive debut in a federal forum, the defendant may reserve its right to adjudicate its federal claims in federal court after the state court makes a definitive ruling upon the unsettled issue of state law. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 417 (1964).

> Abstention in a diversity case is no more an abdication of the constitutional-statutory duty to decide than is abstention in the field of determination of federal questions in which the Federal Courts have a "primacy." *England v. Louisiana State Board of Medical Examiners*, [375 U.S. 411] 1964, 84 S.Ct. 461.
>
> Abstention is neither abandonment of *duty*, on the one hand, nor a problem of raw *power*, on the other. It is judge-fashioned and being such, the cloth should be cut to the pattern.
>
> The doctrine is, of course, a means devised to ameliorate some of the problems inevitably growing out of our unique federalism. For federal question cases, unseemly or unnecessary collision with a state is to be avoided, or at least postponed until such time as it is inescapable. Although the adjustment between the National Courts and a State takes a different turn in diversity cases, the underlying problem is essentially the same. And the impact—on local litigants and jurisprudence—is equally, if not more, awesome.

United Services Life Ins. Co. v. Delaney, 328 F.2d 483, 485-86 (5th Cir. 1964) (Brown, J. concurring) (footnotes omitted); *see also Fonaris v. Ridge Tool Co.*, 400 U.S. 41 (1970) (abstention in diversity case where defendant removed to federal court for Puerto Rican state court ruling on a vague contract statute).

As noted, CCC will not be forced to litigate its federal claims or defenses in state court. CCC can preserve its right to return to this forum for a determination of the constitutional issue by merely stating its reservation on the record before the state court. Pending resolution of the remitted issues, this matter will be stayed.

For the reasons stated, the above described issues will be remitted to the Superior Court of the State of New Jersey, Chancery Division, Passaic County, to afford that court (and appellate courts) the fair opportunity to resolve these issues. Pending the outcome of this procedure, this matter will be stayed and administratively terminated until these issues have been addressed by the New Jersey courts. Following a final decision by the New Jersey courts, if further action of this court is necessary, the parties will so inform the court at which time the matter will be reopened for determination, as appropriate.

SO ORDERED, this 20th day of July, 1989.

/s/ ALFRED J. LECHNER, JR.
Alfred J. Lechner, Jr., U.S.D.J.

AJL:kr
cc: Ellen Smith, Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 89-502

Filed July 27, 1989

INSTRUCTIONAL SYSTEMS, INC.,

Plaintiff,

—v.—

COMPUTER CURRICULUM CORPORATION,

Defendant.

ORDER

IT IS, on this 27th day of July, 1989, pursuant to thisd Court's Letter-Opinion and Order, dated July 20, 1989,

ORDERED:

1. Plaintiff's application for a preliminary injunction is withdrawn;

2. The following issues arising under the New Jersey Franchise Practices Act, N.J.S.A. § 56:10-1 *et seq.* (the "Act"), as embraced in the First Count of the Complaint herein, are hereby remitted to the Superior Court of New Jersey, Passaic County (and such other courts of the State of New Jersey as the parties deem appropriate) for determination:

(a) Whether the Act has extraterritorial reach beyond the State of New Jersey and, if so, to what extent; and

(b) What are the definitions and standards of "community of interest," "license" and "place of business" under the Act?

3. Except as so expressly stated herein, this Court retains and reserves unto itself without limitation:

(a) Jurisdiction over this matter and the parties hereto;

(b) Application of the principles of law determined by the state court to the facts of this case;

(c) Any constitutional challenge to the Act; and

(d) Any application for injunctive or other interim relief.

4. Plaintiffs' request for reconsideration of the Court's Letter-Opinion and Order of July 20, 1989 is denied.

5. Pending a declaration by the Superior Court of the State of New Jersey, and any appellate review of such declaration as may be sought by the parties, this action, including all motions or cross-motions for summary judgment, is hereby administratively stayed and terminated. Following a final decision by the New Jersey courts, if additional action is necessary, the parties will so inform this court at which time this matter will be reopened for determination, as appropriate.

/s/ ALFRED J. LECHNER, JR.
Alfred J. Lechner, Jr., U.S.D.J.

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